(3)

Supreme Court, U.S.
FILED
JUN 20 2001
CLERK

No. 00-1680

In The

Supreme Court of the United States

PACIFIC BELL TELEPHONE COMPANY, a California corporation, and PACIFIC TELESIS GROUP, a Nevada corporation,

Petitioners,

v.

NANCY WAYNE; MARY ANN ACALDO; BARBARA GARVIN; KAREN KENDRICK; DORIS RYAN; and CAROL JANE TIDWELL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MARC S. SCHECHTER
Counsel of Record
JULIA A. NICKERSON
BUTTERFIELD SCHECHTER LLP
525 B Street, Suite 1500
San Diego, CA 92101
(619) 544-1200

A. KENDALL WOOD
HINCHY, WITTE, WOOD, ANDERSON & HODGES
A LAW CORPORATION
525 B Street, Suite 1500
San Diego, CA 92101
(619) 239-1901

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

27 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

A. The Climate Created by Pacific 1

B. Respondents Were Offered an Early Retirement Incentive Plan 2

C. An Enhanced ERB Plan Was Offered Shortly After Respondents Accepted the ERI II Plan 5

D. Pacific's Negotiations With the Union Before and After the ERI II Offer 6

E. The District Court's Findings in its Memorandum of Decision 9

ARGUMENT 10

I. THE WRIT SHOULD BE DENIED BECAUSE THE SERIOUS CONSIDERATION DISCLOSURE REQUIREMENT DOES NOT INTERFERE WITH COLLECTIVE BARGAINING 10

II. THE NINTH CIRCUIT OPINION DOES NOT CREATE A CIRCUIT SPLIT 16

III. THE ISSUE OF A CIRCUIT SPLIT IS NOT RIPE FOR THIS COURT'S REVIEW BECAUSE THE DUTY NOT TO ACTIVELY MISINFORM EMPLOYEES, REGARDLESS OF SERIOUS CONSIDERATION, DOES NOT CONTROL THE OUTCOME OF THIS CASE 20

IV. CONCLUSION 24

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adamcyk v. Lever Brothers Co., 33 F.Supp.2d 679 (N.D. Ill. 1998) 12, 15

Ballone v. Eastman Kodak Co., 109 F.3d 117 (2d Cir. 1997) 19

Bins v. Exxon Co. U.S.A., 220 F.3d 1042 (9th Cir. 2000) 10, 13, 20

Drennan v. General Motors Corp., 977 F.2d 246 (6th Cir. 1992) 11

Fischer v. Philadelphia Electric Co., 96 F.3d 1533 (3d Cir. 1996), cert. denied, 520 U.S. 1116 (1997) 11, 17, 22

Hockett v. Sun Co., 109 F.3d 1515 (10th Cir. 1997) 18, 22, 23

Kurtz v. Philadelphia Elec. Co., 96 F.3d 1544 (3d Cir. 1996) 22

Muse v. IBM, 103 F.3d 490 (6th Cir. 1996), cert. denied, 520 U.S. 1240 (1997) 18, 22, 23

Vartanian v. Monsanto Co., 131 F.3d 264 (1st Cir. 1997) 17, 22

Wayne v. Pacific Bell, 189 F.3d 982 (9th Cir. 1999) 1, 11, 15, 17, 18

Wilson v. Southwestern Bell Tel. Co., 55 F.3d 399 (8th Cir. 1995) 18, 22, 23

FEDERAL STATUTES

29 U.S.C. § 1104 15

BRIEF IN OPPOSITION

Respondents Nancy Wayne; Mary Ann Acaldo; Barbara Garvin; Karen Kendrick; Doris Ryan; and Carol Jane Tidwell respectfully pray that the petition for writ of certiorari sought in this matter be denied.

STATEMENT OF THE CASE

Respondents respectfully refer this Court to the Ninth Circuit's opinion, *Wayne v. Pacific Bell*, 189 F.3d 982, 984-988 (9th Cir. 1999); App. C To Pet. For Cert. 22a-28a, for a complete statement of the relevant facts and procedural history. As explained herein, the petition fails to advance any compelling reason for granting certiorari. The Serious Consideration Disclosure Requirement does not interfere with collective bargaining. The Ninth Circuit did not create a circuit split by creating a rule against actively misinforming and deceiving plan beneficiaries about the availability of future retirement benefits to induce them to retire earlier than they otherwise would. Moreover, this case is not ripe for this Court's review because the rule forming the alleged, but disputed, circuit split does not necessarily determine the outcome of this case.

A. The Climate Created by Pacific

Starting in approximately December 1994, Pacific employees, including Respondents, were given the impression by Pacific that Pacific's financial condition had taken a turn for the worse. (District Court Clerk's

Record number, hereafter referred to as "CR", 54; Excerpts of Record number, hereafter referred to as "ER", 14A, p. 413; ER 14B, p. 420.) Pacific had been cutting back and downsizing. Pacific had sent voice mails to the employees notifying them who had been laid off, that the company was doing poorly, that they needed to sell more products, cut back on their use of office supplies, and to try to save Pacific money. (CR 54; ER 14A, pp. 412 and 416; 14B, p. 420; 14C, p. 426; 14D, pp. 437-438; 14E, p. 440; 14F, pp. 451-452; 14G, p. 458; 14H, pp. 463-464; 14I, p. 467; 14J, p. 476.)

Pacific held special meetings to let the employees know that in the Respondents' workgroup "head count needed to go down by 19 people" and generally what a sad state the company was in. (CR 54; ER 14C, pp. 424-425; ER 14K, pp. 479-480; 14L, p. 49; 14E, pp. 442-443; 14G, pp. 459-460.) The employees were also told that Pacific would have to lose approximately 10,000 employees in five years, that this may be the first time in the history of the company that the shareholders would not receive dividends, and that Pacific projected a loss of approximately 30 percent of its business customers when competition became a reality. (CR 54; ER 14C, p. 426.)

B. Respondents Were Offered an Early Retirement Incentive Plan

It was in this economic climate that, in May 1995, a meeting was held for a group of Pacific Bell employees, including Respondents. Respondents were told that an early retirement package was going to be offered to them. Shortly thereafter, Respondents and others were given an

information package and were officially offered the ERI II. Respondents were told they had a window period of between June 1, 1995, and June 30, 1995, to either accept or reject the ERI II plan. If they accepted, they would have to retire on the 15th day following June 30, 1995. (CR 40; ER 7A, pp. 130-131.)

Between May and the end of June 1995, the eligible employees, including Respondents, asked many questions of their managers and supervisors. They asked whether other enhanced early retirement incentives, specifically a cash incentive, would be offered in the future or whether the ERI II would be further enhanced by a cash payment. The eligible employees, including Respondents, were told directly and indirectly by Pacific supervisors and managers that it was unlikely that there would be better offers and there would certainly be no offers with a cash incentive. (CR 54; ER 14K, pp. 43-46; 14L, p. 490; 14A, pp. 414-415; 14B, pp. 420-422; 14I, pp. 471-473; 14D, p. 436; 14F, pp. 451 and 456; 14H, p. 465.)

Mike Lynch, a manager of the work group at Pacific which included the Respondents, told one of the Respondents, Mary Ann Acaldo, when she asked about possible future enhanced early retirement benefits, "Mary Ann, you're the smart one. All these other people are waiting for a bonus or for extra money. There is never going to be any money. This company can't afford to pay any money." (CR 54; ER 14C, pp. 428-430; ER 14E, pp. 444-445.) Lynch admitted during his deposition that he told employees he did not believe there would be a better offer. (CR 54; ER 14M, pp. 492-493.) Acaldo testified that she told the other eligible employees what Lynch had told her. (CR 54; ER 14C, p. 431.)

Respondent Karen Kendrick did not want to retire when the ERI II was offered so she asked her supervisor, Gladys Sanchez, whether any better offers were going to be made. Sanchez told Kendrick that she "shouldn't count on it." (CR 54; ER 14E, pp. 446; ER 14F, pp. 451.) Respondent Doris Ryan had been ill during the time the ERI II was first offered in late May 1995. When she came back to work, she was offered the ERI II. Babette Norris, her supervisor, told her it would be best for Ryan if she accepted the ERI II. (CR 54; ER 14I, pp. 466-469; ER 14J, p. 477.) Considering what Norris and Acaldo and the others told her when she returned to work, Ryan felt that she better take the ERI II because if she did not, she "would be gone with nothing." (CR 54; ER 14I, p. 470.)

Lynch also told Rita Erickson, a facilities administrator at Pacific and a coworker of Respondents, that "if you are waiting for an offer with money, you are dreaming because the company is broke." Erickson passed this information on to others. (CR 54; ER 14A, p. 415.) Respondent Nancy Wayne also asked her supervisor when she was considering whether or not to accept the offer how things looked in the company, the supervisor said that it looked "gloomy." (CR 54; ER 14A, pp. 416-417.)

Around the same time, Pacific circulated a newsletter entitled "Briefings" which was published by the California Markets Transition Team. (CR 54; ER 14N, pp. 495-498.) The team is a multi-level, multi-function group with representatives from each Pacific Bell business and support unit. The team meets with the executive vice president of Pacific Bell every six weeks. The Briefings

newsletter was the means by which the company communicated the results of the meetings to its employees.

The Briefings issue that reported on the June 6, 1995, meeting contained a section with questions by team members and answers by the Pacific executive vice president. One question asked was if an enhanced early retirement incentive program with a cash incentive would be offered. The executive vice president's answer was that it was "questionable" because of the declining surplus in the pension plan fund. (CR 54; ER 14N, p. 496.)

The answer was interpreted by some of the eligible employees to be a clear indication that the surplus pension funds were drying up so there would be no money available to fund future offers with cash incentives. (CR 54; ER 14C, pp. 432-433; 14K, pp. 481-482; ER 14E, pp. 447-448.) In fact, Pacific had a projection by their own actuary that by the year 2000, if there were no changes to the retirement program, the pension fund would be overfunded by approximately $1.6 billion. (CR 54; ER 14O, pp. 512-513, 520.)

C. An Enhanced ERB Plan Was Offered Shortly After Respondents Accepted the ERI II Plan

Respondents accepted the ERI II plan and took early retirement. Their last day of employment was July 15, 1995. During the first week of August 1995, only three weeks after Respondents retired, a new enhanced early retirement incentive program (the "ERB") was agreed upon and made a part of the collective bargaining agreement between the union and Pacific. The ERB was offered to approximately 30 Pacific employees within a couple of

months. (CR 41; ER 8G, pp. 344-350; ER 8F, pp. 341-343.) The benefits offered under the ERB contained an approximate increase of 13-14 percent in the pension benefits offered and approximately 30 percent more in the form of a cash bonus than the value of the benefits offered to the Respondents under the ERI II Plan. The ERB program would have entitled the Respondents, collectively, to approximately $386,000 more than they received under the ERI II plan. Individually, each Respondent would have been entitled to $99,241.38 (Wayne); $89,919.44 (Acaldo); $41,843.25 (Garvin); $71,334.94 (Kendrick); $26,962.74 (Ryan); and $57,077.85 (Tidwell) more than they received under the ERI II plan. (CR 53; ER 13, pp. 407-408; CR 54; ER 14T, pp. 614-654.)

D. Pacific's Negotiations With the Union Before and After the ERI II Offer

Michael A. Rodriguez was the vice president of Pacific Telesis and the chief negotiator for Pacific during the bargaining sessions with the union regarding the 1995 labor contract which included the adoption of the ERB. He had the authority from Pacific to enter into binding agreements with the union, including an agreement providing for retirement benefits. (CR 54; ER 14P, pp. 574-575.)

Pacific and the union's records of their negotiations reveal that an enhanced early retirement benefit package containing a cash incentive was formally presented to Pacific by the union and discussion of the package was placed on the agenda for the June 15, 1995, bargaining session. (CR 54; ER 14Q, pp. 584-597.) This was before

Respondents had accepted the ERI II and during the time they asked Pacific supervisors and managers whether a retirement package with a cash incentive was going to be offered.

Pacific admits that negotiations relating to an enhanced early retirement program were commenced on June 13, 1995. The union had its proposal on the table which contained a cash incentive and Pacific, having anticipated the issue, had already prepared a counter-proposal and had drafted a proposed Memorandum of Agreement which contained a cash incentive. (CR 54; ER 14Q, pp. 584-597.)

As of June 15, 1995, there is no question that Pacific was seriously considering an early retirement benefit package which would be enhanced by a cash incentive. (CR 54; ER 14P, pp. 577-578; ER 14Q, pp. 584-597.) The union had already offered its proposal which included a cash incentive component. Pacific made its counter-proposal on June 16, 1995, which included a cash incentive and an increase in the pension band. (CR 54; ER 14P, pp. 579-580; ER 14R, pp. 598-604.) The only proposals under consideration were more favorable than the ERI II offered to the Respondents.

The issue to be resolved through collective bargaining was not whether there would be an enhanced early retirement plan, but merely how much the pension band would be increased and how much of a cash incentive would be offered. On or about the same day, a proposed Memorandum of Agreement which incorporated an increase in the pension band and a cash incentive was

presented by Pacific to the union. (CR 54; ER 14P, pp. 580-581; ER 14R, pp. 598-604.)

In late 1994 or early 1995, Pacific Bell representatives, including its Director of Labor Relations, Robert Kelly, had submitted a series of projections and proposals that included a pension annuity component to a steering committee which included Rodriguez. Each of the proposals contained a cash incentive as part of the proposed early retirement benefits, i.e., money would be paid to an employee as an annuity or the employee could cash out all or part of the annuity. (CR 54; ER 14O, pp. 507-511 and 520.)

In June 1995, Kelly gave the steering committee a proposal which included a 4 plus 4, a 20 percent increased severance payment and a pension band increase. (CR 54; ER 14O, pp. 514-515, and 572.) Kelly admitted that, as of June 1995, the pension fund was well above the full funding limit. (CR 54; ER 14O, pp. 516-517.)

Considering the history of proposals and projections performed by Pacific, both well before and during the 1995 bargaining sessions, the company knew a cash incentive was going to be a component in any future early retirement benefit acceptable by the union. Yet its management represented to its employees that no cash incentive would be given in the next package if there was one. The eligible employees were told they had better "take what they could get" while they could. (CR 54; ER 14A, pp. 411-418; ER 14M, pp. 491-494; 14C, pp. 423-434; 14E, pp. 439-449; 14F, pp. 450-456; 14I, pp. 451-452.)

E. The District Court's Findings in its Memorandum of Decision

The district court made certain findings of fact in its Memorandum of Decision. Specifically, the district court made the following findings of fact:

* Respondents asked their immediate supervisors if there might be other financial incentives offered in the future (CR 59; ER 18, p. 693);

* Respondents were told that there would be no better offers and there would definitely be no offers with a cash bonus (CR 59; ER 18, p. 693);

* Pacific advertised that its financial health was poor, that downsizing was inevitable, and that the surplus in the pension plan was drying up (CR 59; ER 18, p. 693);

* On June 15 and 16, 1995, the union and Pacific traded proposals for an early retirement incentive program, both of which included a cash incentive (CR 59; ER 18, p. 693);

* The ERI II required the employees to make their election between June 1 and June 30, 1995. (CR 59; ER 18, pp. 692.)

The district court's findings of fact, and the failure by Pacific to provide the district court with any evidence to demonstrate how and why a truthful and forthright response to Respondents' inquiries would have interfered with the collective bargaining sessions, leads to the conclusion that the district court should not have granted summary judgment.

ARGUMENT

I.

THE WRIT SHOULD BE DENIED BECAUSE THE SERIOUS CONSIDERATION DISCLOSURE REQUIREMENT DOES NOT INTERFERE WITH COLLECTIVE BARGAINING

Pacific's first argument is that the application of the Serious Consideration Disclosure Requirement interferes with the collective bargaining process. Essentially, Pacific would like this Court to create a rule whereby all employers are required to abide by the Serious Consideration Disclosure Requirement, except those employers who have union employees and therefore use the collective bargaining process to negotiate the ERISA benefit plan terms. There is no compelling reason why the policies of the NLRA should trump ERISA's policies in order to carve out an exception to the Serious Consideration Disclosure Requirement for employers employing union employees.

A. The Ninth Circuit's Holding That the Serious Consideration Disclosure Requirement Applies in Collective Bargaining Situations Is Consistent with Other Circuits

Bins v. Exxon Co. U.S.A., 220 F.3d 1042, 1045 (9th Cir. 2000) held that "when a plan participant inquires about potential plan changes, an employer-fiduciary has a duty to provide complete and truthful information about any such changes then under serious consideration." This rule has become commonly known as and is referred to

herein as the "Serious Consideration Disclosure Requirement." The Ninth Circuit stated in its original opinion in this case that "[p]roviding employees with information relevant to their decisions about pension benefits does not interfere with bargaining unless the employer attempts to use those communications to undermine a union's position in bargaining." *Wayne I*, 189 F.3d at 989, App. C To Pet. For Cert. 32a.

The Ninth Circuit stated in *Wayne II* that "[a]n employer attempting to undermine a union's power to bargain on behalf of its members is a far cry from communicating as a fiduciary about serious consideration of a proposal to change employee benefits under an ERISA plan. App. A To Pet. For Cert. 12a. As well, the Ninth Circuit stated such a stance is consistent with the Third Circuit's decision in *Fischer v. Philadelphia Electric Co.*, 96 F.3d 1533, 1539 (3d Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997), in which the court stated:

> An ERISA fiduciary is under no obligation to offer precise predictions about future changes to its plan. Rather, its obligation is to answer participants' questions forthrightly, a duty that does not require the fiduciary to disclose its internal deliberations nor interfere with the substantive aspects of the collective bargaining process (emphasis added).

The Ninth Circuit's opinion adopting the Serious Consideration Disclosure Requirement in a collective bargaining situation is also in line with the Sixth Circuit's decision in *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992), where the court stated:

> The duty to avoid material misrepresentations does not require the employer to predict an ultimate decision to offer a plan so long as it fairly discloses the progress of its serious considerations to make a plan available to affected employees. . . . A fiduciary has a duty not only to inform a beneficiary of new and relevant information as it arises, but also to advise him of circumstances that threaten interests relevant to the relationship. A fiduciary must give complete and accurate information in response to participants' questions, a duty that does not require the fiduciary to disclose its internal deliberations nor interfere with the substantive aspects of the bargaining process. (Emphasis added; internal quotations and cites omitted).

The Ninth Circuit's holding that the Serious Consideration Disclosure Requirement applies in collective bargaining situations is also consistent with a district court opinion in the Seventh Circuit, *Adamcyk v. Lever Brothers Co.*, 33 F.Supp.2d 679, 687 (N.D. Ill. 1998), where the court stated that:

> Contrary to defendant's contention, informing employees that the employer is seriously considering a severance package that will first need to be the subject of collective bargaining does not constitute an unfair labor practice.

The *Adamcyk* opinion holds that "[t]he NLRA does not preclude application of the serious consideration standard." *Adamcyk*, 33 F.Supp.2d at 687.

B. The Record on Appeal Contains No Facts Demonstrating How Disclosure of Seriously Considered Plan Changes Would Compromise the Collective Bargaining Process

Pacific did not provide the district court with any facts to demonstrate how disclosure to its employees of the likelihood there would be a future early retirement benefit package would compromise the company or interfere with the union's role as employees' exclusive bargaining agent. (CR 38-42; ER 4-9, pp. 49-380.) Further, no evidence was provided to the district court that Pacific brought its dilemma, if indeed there was one, to the attention of the union representatives and sought the union's consent to disclose the likelihood of an enhanced early retirement benefit to its inquiring employees. *Id.* Simply put, it is pure speculation that, by disclosing the likelihood of a future early retirement benefit package to a small group of employees to whom the information would be material, would interfere with Pacific's ability to participate effectively in the bargaining sessions.

C. Application of the Serious Consideration Disclosure Requirement in Collective Bargaining Situations Does Not Hurt Plan Participants

The carefully structured Serious Consideration Disclosure Requirement fashioned by the Ninth Circuit in *Bins v. Exxon Co. U.S.A.*, 220 F.3d 1042 (9th Cir. 2000) (*en banc*) and delineated again by the Ninth Circuit in this case does not undermine the collective bargaining process because it does not require disclosure of the details of the union and/or employer proposals under

consideration. Pacific could have informed the beneficiaries who so inquired by merely telling them that an enhanced early retirement benefit was under consideration. Then, it would have been up to the employees to decide whether to base their decision on the "bird in the hand" (ERI II) or on the prospect that there is a "bird in the bush" worth waiting for (probable enhanced ERB). If the negotiations broke down and the ERI II remained in place, or no ERB was agreed upon, then the employer-fiduciary would have had no ERISA liability because it met its Serious Consideration Disclosure Requirement. There are no facts in this regard from which to infer that either the employer's or the union's bargaining position would have been undermined by such a simple disclosure to the appellants before June 30, 1995.

Pacific argues in its petition that the Serious Consideration Disclosure Requirement "will more likely confuse, rather than educate, employees whose benefits are being negotiated through the collective bargaining process." App. To Pet. For Cert. 23. This argument seems to indicate that Pacific has learned nothing from this experience. Pacific knew at the time that the Respondents were considering early retirement that it was likely an enhanced early retirement benefit, in some form, would soon be available to them. Both Pacific and the union had proposed retirement programs that were more favorable to employees than the existing program, and disclosing the likelihood of improved retirement benefits to potentially affected employees would not have interfered with negotiations and would have helped potentially affected employees make informed decisions.

Pacific shouldn't influence the employees' decision by withholding this information. The rule fashioned by the Ninth Circuit assures that the decision by the plan participant who asks will be an informed one. But it also protects the fiduciary from liability if the fiduciary could not have reasonably known that information was material to a particular plan participant.

D. Application of the Serious Consideration Disclosure Requirement in the Context of Collective Bargaining Does Not Undermine ERISA Policy.

ERISA imposes a duty on all plan fiduciaries to act in the best interest of plan participants. (ERISA § 404; 29 U.S.C. § 1104.) ERISA, a statute enacted after the National Labor Relations Act, does not legislate that the employer's fiduciary obligation as a plan administrator is suspended during a collective bargaining process.

Collective bargaining often goes on for a sustained period before an agreement is reached. As the Ninth Circuit has pointed out, to rule that an employer's fiduciary duties are suspended during collective bargaining would produce perverse incentives, such as tempting the employer to extend the bargaining period solely in order to avoid its fiduciary obligations. *Wayne I*, 189 F.3d at 989; App. C To Pet. For Cert. 32a; *Adamcyk*, 33 F.Supp.2d at 687.

E. The Serious Consideration Disclosure Requirement Can Be Met in the Context of Collective Bargaining

Pacific argues that, since serious consideration does not begin in the context of collective bargaining until a proposal has been accepted by the union, disclosure can not be met in the context of collective bargaining. The Ninth Circuit does not agree since it found in this case that serious consideration began, at the latest, as soon as Pacific tendered a proposal to the union during collective bargaining. Specifically, the Ninth Circuit stated, "It is unclear on this record precisely when serious consideration began, but it is at least clear that it had already occurred when Pacific presented in proposed ERB to the Union during collective bargaining on June 19, 1995." App. A To Pet. For Cert. 10a. Accordingly, the Serious Consideration Disclosure Requirement can work in the context of collective bargaining since serious consideration begins, not when a proposal has been accepted by a union, but rather when such proposal is offered to a union by an employer.

II.

THE NINTH CIRCUIT OPINION DOES NOT CREATE A CIRCUIT SPLIT

Pacific's second argument is that the rule of law set by the Ninth Circuit in this case conflicts with the rule of law in other circuits. Respondents disagree with such interpretation. The Ninth Circuit is in agreement with the First, Third, Sixth, Eighth, and Tenth Circuits that as soon as an employer-fiduciary gives "serious consideration" to a proposal to change retirement benefits, it has a duty to

disclose information about the proposal to plan participants and beneficiaries who have so inquired.

In addition, the Ninth Circuit held in *Wayne* that an employer-fiduciary may not "actively misinform" its plan beneficiaries about the availability of future retirement benefits to induce them to retire earlier than they otherwise would. App. A To Pet. For Cert. 3a. Essentially, the Ninth Circuit found that being deceitful and actively misinforming can be material enough to equate to a breach of fiduciary duty. In so doing, did the Ninth Circuit create a circuit split? In order to answer this question, we must look at the facts of each case.

In *Wayne*, the employer actually provided misleading information to those who asked. However, no facts exist in the cases presented to the First, Third, Sixth, Eighth, and Tenth Circuits whereby the employer actively misinformed. Accordingly, the First, Third, Sixth, Eighth, and Tenth Circuits did not rule that actively misinforming can not be material enough to equate to a breach of fiduciary duty. Rather, those circuits were not even presented with such an issue.

In *Vartanian v. Monsanto Co.*, 131 F.3d 264, 267 (1st Cir. 1997), upon inquiry by a plan participant, the personnel representatives stated "they had been unable to confirm the rumors, and did not personally believe that any early retirement package was in the works." The plan participant did not dispute the truthfulness of those statements. Thus, the employer did not actively misinform.

In *Fischer*, 96 F.3d at 1537-38, the employer simply informed the participants who so inquired that no change in benefits was under consideration. The Third Circuit

found that the employer "responded truthfully to employee questions." *Id.* at 1541. No active misinformation was given to the participants with an intention to induce them to retire earlier than they actually would.

In *Muse v. IBM*, 103 F.3d 490, 495 (6th Cir. 1996), *cert. denied*, 520 U.S. 1240 (1997), the "record [did] not contain sufficient evidence to establish that IBM knowingly deceived plaintiffs about the possibility of an enhanced plan." Moreover, the Sixth Circuit found that IBM had not "engaged in a targeted plan to deceive the plaintiffs and thus reduce their benefits." *Id.* at 495.

In *Wilson v. Southwestern Bell Tel. Co.*, 55 F.3d 399, 406 (8th Cir. 1995), the plaintiffs alleged that the employer not only breached their fiduciary duty because it failed to disclose after serious consideration, but also that the employer actively misinformed its plan participants with an intent to deceive. The Eighth Circuit found that the employees "did not meet their burden of showing misrepresentation, either intentional or negligent." *Id.*

In *Hockett v. Sun Co.*, 109 F.3d 1515, 1519 (10th Cir. 1997), there was no inducement by the employer to retire early, as the plaintiff in that case resigned prior to asking if he would be offered a better retirement package. Accordingly, there could be no active misinformation or deception to induce him to retire earlier than he otherwise would.

The facts in *Wayne* are different than the other Circuits since Pacific did actively misinform in order to induce earlier retirement. The Ninth Circuit specifically found that a reasonable fact finder could conclude that:

> There is evidence in the record that Pacific affirmatively represented to its employees that no offer of an improved benefits package would be offered when, in fact, Pacific knew that it would propose such a package to the Union and that there was at least a reasonable probability that some version of the package would ultimately be incorporated into the collective bargaining agreement. App. A to Pet. For Cert. 14a.

In so finding, the Ninth Circuit held that actively misinforming can be material enough to equate to a breach of fiduciary duty. The Ninth Circuit relied upon the Second Circuit in *Ballone v. Eastman Kodak Co.*, 109 F.3d 117 (2d Cir. 1997), the only other serious consideration case where the employer did actively misinform and deceive plan participants to retire earlier than they otherwise would. In *Ballone*, the employer "made false assurances that future enhancements have been ruled out." *Ballone*, 109 F.3d at 124.

Upon a thorough inspection of the facts, it becomes clear that the Ninth and Second Circuits did not expand the Serious Consideration Disclosure Requirement set forth in the First, Third, Sixth, Eighth, and Tenth Circuits. Rather, the cases presented to the Ninth and Second Circuits contained facts whereby the employer was providing enough misleading information in order to equate to a breach of fiduciary duty – facts which did not exist in the cases presented to the other circuits.

III.

THE ISSUE OF A CIRCUIT SPLIT IS NOT RIPE FOR THIS COURT'S REVIEW BECAUSE THE DUTY NOT TO ACTIVELY MISINFORM EMPLOYEES, REGARDLESS OF SERIOUS CONSIDERATION, DOES NOT CONTROL THE OUTCOME OF THIS CASE

Even if the Ninth Circuit did expand the Serious Consideration Disclosure Requirement and thus created a circuit split, this case is not ripe for this Court's review because the rule against actively misinforming does not control the outcome of this case.

A. We Don't Know When Serious Consideration Of The Enhanced Plan Began.

Depending upon the factual finding still to be made by the district court on remand, it is possible for the Respondents to prevail based upon the Serious Consideration Disclosure Requirement as established in any of the Circuits. Serious consideration may have begun prior to the time Respondents made their affirmative inquiries to Pacific. The record is unclear as to this issue. This was a reason why the Ninth Circuit remanded the case for further proceedings. Specifically, the Ninth Circuit stated,

> To determine when the *Bins* duty to disclose arose, the district court must determine, irrespective of the pendency of collective bargaining, the date on which Pacific began 'serious consideration' of improved retirement benefits. App. A to Pet. for Cert. 14a.

If the district court does find that serious consideration of the ERB did begin prior to the time Respondents were

informed no enhanced plan would be offered, Respondents would prevail on the Serious Consideration Disclosure Requirement alone. Thus, whether or not Pacific actively misinformed may not be necessary to a resolution of this matter in favor of Respondents. Since the rule forming the alleged, yet disputed, circuit split would not necessarily determine the outcome of this case, the issue of a circuit split is not ripe for this Court's review.

B. We Know That There Was Serious Consideration To Offer An Enhanced Package Prior To The Time Respondents Actually Retired.

Pacific began serious consideration of the ERB at the latest on June 19, 1995. The Ninth Circuit's opinion states, "It is unclear on this record precisely when serious consideration began, but it is at least clear that it had already occurred when Pacific presented its proposed ERB to the Union during collective bargaining on June 19, 1995." App. A To Pet. For Cert. 10a. The window period to elect the ERI II lasted through June 30, 1995. Thus, there was a period of at least 11 days during which time Pacific had serious consideration of the ERB proposal, yet failed to disclose such information to the Respondents. During these 11 days, Pacific knew Respondents were relying upon their communications of 13 days earlier that a better early retirement offer would not be made in the future. The record is unclear if Respondents made repeated inquiries after June 19, 1995. Accordingly, the outcome of this case does not rely upon the Ninth Circuit's rule against actively misinforming. Rather, there was serious

consideration to offer an enhanced early retirement package prior to the time Respondents accepted the less generous early retirement plan.

These facts are in direct contrast to the facts in each related case in the various circuits. In *Vartanian*, 131 F.3d 264; *Fischer*, 96 F.3d 1533; *Kurtz v. Philadelphia Elec. Co.*, 96 F.3d 1544 (3d Cir. 1996); *Muse*, 103 F.3d 490; *Wilson*, 55 F.3d 399; and *Hockett*, 109 F.3d 1515, employees failed to show that the employer seriously considered a plan to offer enhanced early retirement benefits before such employees accepted the less generous early retirement plan. In each of these cases, serious consideration began after the employees had already accepted a different package and after they had in fact retired.

In *Vartanian*, 131 F.3d at 266, the First Circuit held that there was no breach of fiduciary duty because "no enhanced severance package that would have affected Vartanian was under 'serious consideration' at the time he retired." Vartanian retired on May 1, 1991. *Id.* Serious consideration of the enhanced severance package began on May 29, 1991. *Id.* at 272.

In *Fischer*, 96 F.3d at 1541, serious consideration of the enhanced plan began on April 7, 1990. All of the members of the plaintiff class retired before April 7, 1990. *Id.* at 1543. The Third Circuit entered judgment for defendants on plaintiffs' breach of fiduciary duty claim. *Id.*

In *Kurtz*, 96 F.3d at 1550, May 28, 1987, marked the beginning of serious consideration of an enhanced plan. Judgment was entered for the defendants on the claims of all employees who asked about a benefits change and retired before May 28, 1987. *Id.*

Likewise, in *Muse*, 103 F.3d at 491, plaintiffs retired prior to March 31, 1990. Serious consideration of IBM's increased early retirement program did not occur until after such date. Again, the employer did not seriously consider the plan prior to plaintiffs' retirement. The Sixth Circuit held no breach of fiduciary duty.

In *Wilson*, 55 F.3d at 404, plaintiffs all terminated employment on or before December 31, 1990. The Eighth Circuit found that "[a]lthough there may be some question as to when in 1991 the [increased retirement plan] was first seriously considered, there is no dispute that this consideration occurred in 1991." Once again, another case where plaintiffs lost because they all retired prior to serious consideration.

Finally, in *Hockett*, 109 F.3d at 1519, plaintiff retired effective as of July 1, 1991. Sun Company did not "seriously consider a future ERISA offering until sometime after July 1, 1991." *Id.* at 1524. Accordingly the Tenth Circuit found no breach of fiduciary duty.

The Respondents may prevail simply on the Serious Consideration Disclosure Requirement and need not rely on the rule stating that fiduciaries have a duty not to actively misinform. Since the rule forming the alleged, yet disputed, circuit split would not necessarily determine the outcome of this case, if the Court were to grant certiorari based on such a split, it would be doing so only to make a policy decision.

IV.

CONCLUSION

For all of the above stated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

MARC S. SCHECHTER
Counsel of Record
JULIA A. NICKERSON
BUTTERFIELD SCHECHTER LLP
525 B Street, Suite 1500
San Diego, CA 92101
(619) 544-1200

A. KENDALL WOOD
HINCHY, WITTE, WOOD,
ANDERSON & HODGES
A Law Corporation
525 B Street, Suite 1500
San Diego, CA 92101
(619) 239-1901